IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER No. 156 of 2006

Pandurang Bhausaheb Lokhande
and two others .. Appellants

versus

Smt.Darubai Bala Lakde .. Respondent

...

Mr.A.H. Palekar for the appellants.

None for the respondent.

CORAM : D.G. KARNIK, J

DATED : 1st December 2006

P.C.:

1. This appeal is directed against the order of remand dated 21st October 2005 passed by the 13th Adhoc Additional District Judge, Pune allowing Appeal no.698 of 2006 filed by respondent no.1 herein and remanding the suit for fresh trial in accordance with law.

2. The properties bearing Gut nos.630, 272, 46, 45, 40 and 50 situate at Village: Ranjangaon, Taluka:Shirur, District: PUne (for short "the suit properties") totally admeasuring about 17 hectars (i.e. about 42 acres) are the subject matters of the suit. Name of the respondent no.1 was recorded in the revenue records as an owner of the suit properties vide mutation entry no.211, having inherited the same from her father. The appellants, who are nephews of the respondent, filed a suit bearing Regular Civil Suit no.364 of 2001 in the Court of Civil Judge, Junior Division, Ghodnadi Shirur for a declaration that they were the owners of the suit property and for an injunction restraining the respondent from disturbing their possession of the suit property. The suit was not served on the respondent. It however appears that even though suit summons was not served and the respondent had not appeared the suit was placed before the Loknyayalaya and a pursis styled as "compromise pursis" was filed bearing the signatures of the appellants and the thumb impression purporting to be that of the respondent. The compromise pursis was also signed by Mr.S.B. Gaikwad. Advocate for the appellants- plaintiffs and one Smt.Seema Kashikar, a junior advocate working in the office of Mr.S.B.Gaikwad appeared for the respondent. The said

compromise pursis bears a typed date 12/9/2001, but the typed date is scored out and handwritten date as "21/10/2001" is put on the purshis. It appears that the said compromise pursis was subsequently placed before the court i.e. the Court of Civil Judge, Jr.Division, Ghodnadi on 21st October 2001. There is however no endorsement on the compromise pursis that the compromise pursis was first placed before the Loknyayalaya and then subsequently placed before the court. There is also no endorsement either of any member of the Loknyayalaya or of the Judge on the said compromise pursis. A certified xerox copy of compromise pursis marked as Exhibit-8 to the suit is handed to me by learned counsel for the appellants. The copy is taken on record and marked "X" for identification. Counsel for the appellants also handed in a copy of the decree passed in suit no.364 of 2001. A copy of the decree is taken on record and marked "Y" for the purpose of identification. From the decree, it appears that the court passed order in the suit to the following effect.

> "In view of compromise purshis Exh-8 filed by both parties with their Advocates before Lok-Nyayalaya
>
> Hence suit it disposed off as compromise purshis.
>
> Court fee refunded as per rule. Decree be drawn as per terms of compromise.

Date: 21.10.2001.

sd (R.T. NAZGE)
Joint Civil Judge Jr.Division
Ghodnadi - Pune.

3. According to the respondent, she had not engaged Ms.Seema Kashekar as an advocate and had not appeared before the Lok Nyayalaya. She had not put her thumb impression on any compromise pursis but some person appears to have personified her and a false compromise was filed on the basis of which compromise was recorded by the court. The respondent on becoming aware of such fraudulent act of the appellants filed an appeal in the District Court Pune, which was heard by 13th Adhoc Additional District Judge, Pune. Before the lower appellate court, it was contended that in view of the provisions of sub-section (3) of section 96 of the Code of Civil Procedure, no appeal lay against a compromise decree and therefore the appeal filed by the respondent before the lower appellate court should be dismissed as not maintainable. The appellate court called for the record and proceedings and after examining the record and proceedings, it found that the compromise pursis Exhibit-8 bore a thumb impression purporting to be that of the

respondent. However, the thumb impression was not that of the respondent. It was not attested and did not bear the signature of any attesting witness. The appellate court also noticed that respondent had filed a complaint against the appellant alleging that the thumb impression on Exhibit-8 was not hers and prayed that the said thumb impression be sent for verification to the finger print expert. The appellate court also held that the trial court had not recorded the compromise as was required to be done under Order 23 Rule 3 of the Code of Civil Procedure. The trial court had not recorded the presence of the parties and had not recorded it was written and signed by parties as required by law. The lower appellate court therefore held that it was not a valid compromise and therefore the appeal was maintainable. The appellate court noted that the summons of the suit was never served on the respondent and that on the date of compromise, vakalatnama of Ms.Seema Kashekar, Advocate was filed on behalf of the respondent. Ms.Kashekar was working in the office of Mr.S.B. Gaikwad, Advocate who was acting for the plaintiff. The lower appellate court therefore came to the conclusion that there was in fact no valid compromise recorded in accordance with

the law. The lower appellate court held that the appeal was maintainable and the bar contained under sub-section (3) of section 96 was not applicable as factually there was no valid compromise. In this view of the matter, the lower appellate court allowed the appeal and remanded the suit back for fresh trial in accordance with law. That judgement is impugned in this appeal.

4. Learned counsel for the appellant submitted that the appeal before the lower appellate court was barred under sub-section (3) of section 96 of the Code of Civil Procedure. He also submitted that there was a valid compromise between the parties on 21st October 2001 and judgement of the lower appellate court that there was no valid compromise as per Exhibit-8 in the suit is merely based on surmises and not on evidence. He therefore submitted that the appeal ought to have been dismissed by the lower appellate court. Relying upon the decision of the Supreme Court in Pushpa Devi Vs. Rajinder Singh & ors. reported in 2006 SAR (Civil) 599, the counsel submitted that the only remedy available to a party to avoid a consent decree was to approach the court which recorded the compromise and made the decree.

Only the court which recorded the compromise itself can consider and decide the question as to whether there was a valid compromise or not.

5. Section 96 of the Code of Civil Procedure provides that save where otherwise expressly provided by the Code or by any law for the time being in force an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorised to hear the appeals from the decision of the said court. Sub-section (2) of section 96 provides that an appeal may lie from a original decree passed ex-parte. Sub-section (3) then provides that no appeal shall lie from a decree passed by the court with the consent of the parties. It would therefore be required to be seen whether the decree dated 21st October 2001 passed in Regular Civil Suit no.364 of 2001 was passed by consent of the parties. Rule (3) of Order 23 of the Code of Civil Procedure reads thus:

> 3. Compromise of suit - Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfied the plaintiff in

> respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit.
>
> . Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.

Rule 3 of Order 23 deals with compromise or consent decrees and provides that there it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, the Court shall order such agreement of compromise or satisfaction to be recorded and shall pass a decree in accordance herewith (underlining supplied). The essential things for a court to pass a consent decree or a compromise decree under sub-rule (3) of Order 23 are as follows:-

i) There must be a lawful agreement or compromise

between the parties regarding the suit

ii) The agreement or compromise must be in writing and signed by the parties.

iii) The Court must be satisfied about (i) the factum of such written agreement as well as (ii) the agreement being lawful (legally valid)

iv) On being satisfied about the factum of the agreement and it being lawful, the court must record such agreement or compromise and then pass a decree in accordance herewith.

6. In the present case, the lower appellate court has recorded a finding of fact that the compromise was not signed by the respondent. No doubt a thumb impression purporting to be that of the respondent appears on the compromise pursis Exhibit-8. The lower appellate court, however, has disbelieved that it was the thumb impression of the respondent and has given cogent reasons for its conclusion. Firstly, the lower appellate court has recorded that the thumb mark is not attested. On the right hand side of the thumb impression, there is an endorsement that thumb mark is

of Darubai Ladke i.e. the respondent but nobody has signed below that endorsement. Thus, the thumb mark is not attested. Thus nobody has identified the thumb mark to be that of respondent. The respondent herself has denied to have put her thumb mark. Secondly, it may be noted that prior to the filing of the compromise on 21st October 2001, the suit summons was not served on the respondent. The respondent was therefore not likely to have known about the suit being filed against her. The respondent had not engaged any independent advocate before 21st October 2001 when the compromise pursis was filed. Only vakalatnama of Mrs.Seema Kashekar was filed and Seema Kashekar appears to have signed as an advocate for the respondent. It is worthwhile to note that Mrs.Seema Kashekar is working as a Junior advocate in the office of S.B. Gaikwad, the Advocate for the appellants. Legally there may or may not be any bar for Mrs.Kashekar to accept an independent brief but looking to the entire circumstances of the case and the fact that the suit summons was not served and the advocate of little standing working in the office of the advocate for the appellants voluntarily appeared on behalf of the respondent and filed a compromise pursis on the very day of appearance, raises a strong

suspicion about the genuineness of the transaction. The respondent had denied her presence and has denied the thumb mark on the compromise pursis to be that of hers. It is also worthy to note the contents of the compromise pursis. It is in marathi language. When translated it reads thus:

> "In this matter, plaintiffs and defendant have compromised the matter as follows :
>
> . The plaintiffs' suit is true and admitted by the defendant. The suit properties belong to the plaintiffs and the defendant's name thereon is shallow. The suit properties are possessed by the plaintiffs. The defendant has no concern to the suit property. The defendant's name has been recorded to the suit property by mistake. The defendant admits that the suit property belongs to and is in possession of the plaintiffs.

Accordingly, this compromise is entered into between the plaintiff and the defendant. Compromise decree may be passed accordingly. Parties shall bear their own costs.

This compromise purshis.

Typed date 12.9.2001
date scored out and written by hand as 21.10.2001.

S.B. Gaikwad.

Advocate for the plaintiff

sd/-
plaintiff no.1

sd/-
plaintiff no.2.

sd/-

plaintiff no.3

Thumb impression of the defendant

A bare reading of the pursis would show that it is not a compromise pursis but at best it can be regarded as pursis of admission on the basis of which a court could have passed a decree under Order 12 Rule 6 of the Code of Civil Procedure. The suit properties were mutated in the name of the respondent after her father. The suit properties admeasure more than 40 acres and are situated in the periphery of highly developed city of Pune. The respondent is old and her age is shown to be 98 years in the present appeal memo by the appellants themselves. It is highly unlikely that any same person would give up the rights in a very large and very valuable property without any consideration and that too on the very first day of voluntary appearance without summons. In the circumstances, the finding recorded by the lower appellate court that there was no valid compromise between the parties is not only a possible but an eminently probable finding of fact and there

is no reason for me to interfere in the said finding of fact.

9. Once it is held that there was no valid compromise between the parties, the provisions of sub-rule (3) of section 96 would not apply at all.

10. In Pushpa Devi Bhagat Vs.Rajinder Singh (Supra) the facts before the Supreme Court were that the landlord had filed a suit for eviction after terminating the tenancy. The suit was part-heard. Two witnesses were examined and their evidence was over. Thereafter the case was adjourned on number of times for defendants' evidence. It was at that stage when the matter was compromised between the parties and the defendants agreed to vacate the suit premises after about 7 months. It was subsequently found that the counsel who had represented the defendants had not filed vakalatnama on behalf of defendant nos.3 and 4 but he then made a statement that he was authorised to make the statement and he subsequently filed the vakalatnama on their behalf. Accordingly, a fresh decree was drawn on his statement. Thereafter one of the defendants filed an appeal against the consent decree on the ground that there

was no agreement of compromise in writing and signed by the parties. On that ground, appeal was allowed and matter was remanded to the trial court. Judgement of the lower appellate court was confirmed by the High Court which was challenged before the Supreme Court. Two questions arose before the Supreme Court viz. i)whether the appeal filed by Pushpadevi for one of the defendant u/s.96 of the Code of Civil Procedure against the consent decree was maintainable ii) Whether the compromise dated 23rd May 2001 resulting in the consent decree was not a valid compromise under Order 23 Rule 3 of the Code of Civil Procedure. On the second point, the Supreme Court held that in that case there was a compromise in fact between the parties. As there was a compromise, the appeal under sub-section (3) of section 96 was not maintainable.

11. The decision of the Supreme Court is distinguishable on facts. Therein it was held as a fact that there was a compromise and hence the appeal was held to be barred by section 96(3) of the Code of Civil Procedure. In the present case, the lower appellate court has held that there was no compromise in fact between the parties. The respondent had not

put her thumb mark. She had not appointed the Advocate who purportedly signed on her behalf. Thus, there was no compromise infact. Therefore, bar under sub-section (3) of section 96 is not applicable.

12. Assuming that the respondent had appointed an Advocate and she had an authority to sign Exhibit-8, that purshis at best would be regarded as pursis of admission on the basis of which a decree could be passed under Order 12 Rule 6. Section 96(3) does not bar an appeal against a decree passed on admission under Order 12 Rule 6 of the Code of Civil Procedure. Therefore, also the appeal was maintainable.

13. No other point was canvassed by the counsel for the appellant. In the circumstances, there is no merit in the appeal which is hereby dismissed. The trial court is directed to hear the suit on merits without in any way being influenced by any of the observations made in this judgement.

14. Learned counsel for the appellant prays for the stay of the operation of this order to enable them to persue further remedies. Accordingly,

operation of this order is stayed for a period of six weeks.

D.G. KARNIK, J